NO. 19509

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSEPH CLYDE AMSLER,
OHN WILLIAM IRWIN,

Appellants,

vs.

NITED STATES OF AMERICA,

Appellee.

See Vol. 3365

PETITION FOR REHEARING

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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PETITION FOR REHEARING

O THE HONORABLE JUDGES BARNES, CECIL AND ELY OF THE NITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL IRCUIT.

Appellee (hereinafter referred to as the Government) hereby etitions for a rehearing to reconsider the judgment entered on May 3, 967, on the following grounds.

The sole question which resulted in reversal of these judgments of onviction was inadequately presented. Irwin never raised the question. msler did not specifically designate the §3432 point among some 37 oints on appeal [C. T. 208]. Although Amsler did raise the point in his pening brief, neither Amsler nor the Government adequately briefed the uestion. The point was not touched on by counsel or by the court during ral argument.

Judge Cecil correctly stated that "... It was apparently conceded and understood by the court and counsel throughout the entire pre-trial proceedings that Sinatra was released unharmed. For this reason it appears that the offense was considered and tried as a non-capital offense ..." However, the Government suggests that, by virtue of counsel's failure to brief and argue the question in the context of Smith and the entire record, this court reached incorrect inferences and conclusions. These are:

(1) That Judge East neglected to do what the Supreme Court in Smith, and this Court, said a trial judge must do, namely to "... make informed decisions prior to trial which will depend on whether the offense may be so punished" rather than "... await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense"; and that "It is the responsibility of the trial judge to interpret the indictment, determine what offense is charged and conduct the trial accordingly" (Smith v. United States, 360 U.S. 1, 8-9; this court's opinion at p. 7);

(2) That there could be no waiver of §3432 rights, notwithstanding defense counsels' failure to specifically request the benefits of such rights; and

(3) That the court must reverse under the plain error rule (court's opinion at p. 7).

It is the clarification of these inferences or conclusions which the Government respectfully suggests justify an en banc rehearing in the interest of justice.

I

That Judge East made the "informed decisions prior to trial"

which this Court felt were compelled under Smith [1] and fully discharged his "responsibility ... to conduct the trial accordingly" is confirmed by the record (See App. A and A-1). Surely in the light of this record it is not reasonable to conclude that Judge East failed to discharge his responsibility to interpret the indictment and to determine what offense was charged; nor can it be said that his decisions were not "informed" or that they were not made until the conclusion of the evidence [R. T. Vol. I January 20, 1964, pp. 27-29; R. T. pre-trial February 5, 1964, pp. 17-18, 74, 85; R. T. February 10, 1964, pp. 5-7, 12, 53, 94-111; Vol. IV Motion To Suppress, pp. 504-505, 515; cf. United States v. Morris, supra. See Appendix A and Appendix A-1].

II

Assuming appellants were entitled to §3432 rights, these rights were waived.

Judge Cecil notes that this Court was unable to find in the record any specific request by defendants of the benefits of §3432 (p. 7). There was none. Nor does the record reflect any objection by defense counsel based on §3432 with respect to the ten extra peremptory challenges [2] or

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[1] The precise holding of Smith is that any prosecution under the Federal Kidnapping Act must proceed by indictment and not by information regardless of whether or not the indictment alleges harm to the victim. The Government does not concede that Smith holds, for all purposes, that a suit under 18 U. S. C. 1201 must proceed as a capital case from the outset (Smith, supra, at p. 6) nor does the Government concede that, except by "clear dictum" Smith rejected the rule that before one can be prosecuted for the capital offense he must be charged with it. United States v. Morris, 178 F. Supp. 694, 698; aff'd 277 F. 2d 927; cert. den. 364 U. S. 848; see Justice Clark's separate opinion in Smith at p. 12). Cf. Beck v. Miriani, 293 F. 2d 333 (6th Cir. 1961).

[2] The right as to twenty peremptory challenges was raised neither by Irwin nor Amsler on this appeal (Amsler's op. br. pp. i-vi; Court's opinion at p. 7).

as to impaneling the jury (except as to the method of selection see p. 5), nor was objection made to any Government witness.

Having failed to claim these rights in the court below, defendants waived those rights in United States v. Morris, 178 F. Supp. 694, aff'd. 277 F. 2d 927, cert. denied 364 U. S. 848. Morris dealt with the identical question. In Morris, the victim was released unharmed; the case was tried as a noncapital case; defense counsel failed to claim §3432 rights. The court, in Morris, held that by "by failing to object to any of the Government witnesses or to the impaneling of the jury, defendant cannot now object, particularly where hindsight has disclosed neither surprise ... nor prejudice ... of any juryman, the major reason for ... these procedural safeguards." (Morris, supra, p. 699).

Even constitutional rights may be waived. Lee v. United States, 343 U. S. 747, 750; Brown v. Walker, 161 U. S. 591, 597; Diaz v. United States, 223 U. S. 442, 450-451; Patton v. United States, 281 U. S. 276. Although under the aggravated facts in Smith, the court held the waivers not binding, even Smith recognized such safeguards may be waived (Smith, supra, at p. 9 and footnote at p. 5). Here only a statutory right is involved which a fortiori may be waived. (For specific Supreme Court authority as to waiver of §3432 rights see Morris, supra, p. 699, citing Logan v. United States, 144 U. S. 263, 304-307; Hickory v. United States, 151 U. S. 303, and other cases.

III

Even assuming no waiver, there was no reason to reverse these judgments of conviction under the plain error rule. Irwin was not convicted of Count Two, the only count which involved a death sentence. If Irwin were retried, he would not be entitled to the §3432 rights on retrial [C. T.

329, Vol. 19; R. T. 4310]. Even Amsler, having received an "implicit acquittal" as to the capital offense inherent in Count Two, cannot be retried for that capital offense under former jeopardy principles. Green v. United States, 355 U.S. 184, 190-198; United States v. Wilkins, 348 F.2d 844 (2nd Cir. 1965), cert. denied 385 U.S. 913. Why, then, should the court have ordered a retrial on this point? The court need not have reached the problem in Smith since there were five concurrent remaining counts free of any error. Cf. Gilbert v. United States, 359 F.2d 285 (9th Cir. 1966). No substantial rights were affected (See App. B-1).

As the court observed in Morris, "It would be illogical to grant a new trial for every error defense counsel makes in the conduct of a trial, unless that error is likely to result in some substantial harm to the defense. On the contrary to grant a new trial in this case, where the evidence is overwhelmingly in favor of defendant's guilt and the record indicates complete fairness to the defendant, would be a mockery of that justice and fair play to which the victims of this man's wrongdoing as well as the people of the United States are entitled." Morris, supra, at p. 699.

The Government respectfully suggests that the rehearing requested be granted en banc.

Respectfully submitted,

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CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for purposes of delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ Donald A. Fareed

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